90-105

(1)

No. 90-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

LOIS MORALES,

Petitioner,

vs.

KANSAS STATE UNIVERSITY,
and KANSAS BOARD OF REGENTS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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QUESTIONS PRESENTED

1. Is a state employee entitled to full representation by an attorney in an administrative hearing concerning her job performance evaluation where such evaluation is a prerequisite to disciplinary action, will affect future pay raises, will affect future promotional opportunities, and will determine her score for "layoff" purposes?

2. Where a public employee has been terminated pursuant to a minimal pre-termination hearing, and reinstated at a subsequent hearing before the Civil Service Board to a lesser position, is such employee entitled to back pay to the date of dismissal at the lesser pay rate?

PARTIES TO THE PROCEEDING

All parties to the proceeding in the Kansas Supreme Court are listed in the caption of the case in this Court.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

The Petitioner, Lois Morales, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Kansas Supreme Court entered in this proceeding on April 13, 1990.

OPINIONS BELOW

There are no official or unofficial reports of any opinions in the courts below. However, the non-published decision of the Kansas Court of Appeals and the decision on review by the Kansas Supreme Court are appended hereto. The decision of the Kansas Supreme Court is appended hereto as Appendix A and the decision of the Kansas Court of Appeals is appended hereto as Appendix B.

JURISDICTION

The judgment of the Kansas Court of Appeals herein was entered on September 1, 1989. A timely Petition for Review to the Kansas Supreme Court was filed and this Petition for Review was granted on November 7, 1989. The decision of the Kansas Supreme Court was issued on April 13, 1990. Jurisdiction is in this Court pursuant to 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case arises under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which states as follows:

> "**Section 1. Citizenship; privileges or immunities; due process clause.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" U.S.C.A., Constitution, Amendment XIV.

Additional, relevant statutes are as follows:

> **K.S.A. 75-2929e(a).** The state civil service board within thirty (30) days after hearing and consideration of the evidence shall affirm, modify or reverse a case on its merits and order any other action it deems appropriate. (Now repealed.)
>
> **K.S.A. 75-2943(c).** After consultation with appointing authorities and other supervising officials, the director shall establish, and from time to time amend, a system of performance ratings which shall provide for general categories of performance levels and such other criteria as the director may prescribe for each class of positions in the classified service or for groups of classes. In accordance with K.S.A. 75-3706 and amendments thereto, the secretary of administration shall adopt rules and regulations in respect to such performance ratings, and such performance ratings shall be considered in determining the advisability of transfers, the promotion of an employee to a higher class, the questions of reduction or dismissal of any employee, increases

and decreases in salary of an employee within the salary range established under this act, and in all other decisions relating to the status of employees. In accordance with K.S.A. 75-3706 and amendments thereto, the secretary of administration shall adopt rules and regulations prescribing the extent to which such ratings and the reports upon which they are based shall be open to public inspection by the public and by the affected employees.

K.S.A. 75-2949(a). An appointing authority may dismiss or demote any permanent employee in the classified service when the appointing author-ity considers that the good of the service will be served thereby and for disciplinary purposes may suspend without pay a permanent classified employee for a period not to exceed 30 calendar days, but no permanent employee in the classified service shall be dismissed, demoted or suspended for political, religi-ous, racial or other nonmerit reasons.

K.S.A. 75-2949e(b). Unless the appointing authority determines that the good of the service will best be served by proceeding directly to the procedure prescribed in K.S.A. 75-2949 and amendments thereto, the appointing authority may propose dismissal, demotion or suspension of a permanent employee for defici-encies in work performance only after the employee has received two performance evaluations in the 180 calendar days

immediately preceding the effective date of the proposed dismissal, demotion or suspension. These performance evaluations shall be spaced at least 30 calendar days apart.

Relevant Kansas Administrative Regulations are as follows:

K.A.R. 1-7-12. Evaluation appeal procedure. (a)(1) Any employee who is eligible to appeal a performance evaluation under K.A.R. 1-7-11 and who believes that he or she has been unfairly rated may, within seven calendar days after the employee has been informed of the rating, address an appeal in writing to the appointing authority.
(2) The appointing authority or such authority's designee, within seven calendar days following receipt of the employee's written notice of appeal, shall have the option either to make any changes in the rating deemed appropriate, or to appoint a committee of three or more persons to hear the appeal.
(3) If the appointing authority or the authority's designee makes any change in the rating, or adds any comments to the rating form, the rating form shall be returned to the employee to be signed again. The employee shall be informed that, if he or she disagrees with the revised evaluation, the employee may, within seven calendar days, file an appeal in writing to the appointing

authority. If the employee files such an appeal, the appointing authority or the authority's designee shall, within seven calendar days following receipt of the employee's written notice of appeal, appoint a committee of three or more persons to hear the appeal.
(4) If an appeal committee is appointed to hear the appeal, persons shall be appointed who, in the authority's judgment, will be fair and impartial in discharging their responsibilities. Before appointing the appeal committee, the appointing authority shall give the employee a reasonable opportunity for consultation on the matter of appointment of the appeal committee. The appeal committee shall not include the initial rater or raters. Members of the appeal committee shall be officers or employees of the agency. However, the appointing authority may select one or more members of the committee from one or more other state agencies if the appointing authority determines that the objective of a fair and impartial hearing can best be served by doing so.
(b)(1) As soon as the committee has been appointed, the appointing authority shall notify the employee of the names of the members of the committee.
(2) The appeal committee shall consider any relevant evidence that may be offered by the employee and the rater, and shall make available to the employee any evidence it may secure on its own initiative. The employee and rater shall have an opportunity to

question any person offering evidence to the appeal committee. The appeal committee may limit the offering of evidence it deems to be repetitious.
(3) Within 14 calendar days of the date the members of the committee were appointed, the committee shall prepare and sign a rating for the employee. That rating shall be final and not subject to further appeal. The appeal committee shall give the rating to the appointing authority, who, within five calendar days, shall transmit copies to the employee, the person or persons who originally rated the employee, and the division of personnel services.
(4) If the appointing authority cannot appoint an appeal committee in the prescribed seven calendar days, or if the appeal committee cannot make its rating within 14 calendar days of the date of its appointment, the appointing authority may extend these time limits. However, such an extension shall not result in the appeal committee making its rating more than 30 calendar days from the date the appeal was filed, except with the approval of the director of personnel services.

K.A.R. 1-7-13. Utilization of evaluation ratings. (a) When recommending a salary step increase for an employee, the appointing authority shall consider the performance evaluation record of the employee.
(b) A current performance

evaluation rating of less than satisfactory may be considered by the appointing authority as sufficient reason for recommending a decrease in salary within the authorized salary range and in accordance with the provisions of K.A.R. 1-5-20.

(c) Subject to the provisions of K.S.A. 75-2949e, two consecutive evaluations of less than satisfactory may be utilized as a basis for demotion or suspension or dismissal of the employee. Nothing in this subsection shall be construed as limiting the authorization of an appointing authority to take any disciplinary action authorized by K.S.A. 75-2949e and K.S.A. 75-2949f, as amended by 1985 HB 2125.

(d) If the performance evaluation assigned to a probationary employee at the end of the employee's probationary period is less than satisfactory, the employee shall not be granted permanent status.

(e) For promotional examination purposes, the performance evaluation ratings of each employee shall be combined with a rating of the employee's length of service in related employment by the state, to give a factor which shall constitute one part of each promotional examination. Any employee whose latest performance evaluation rating was less than satisfactory shall not be admitted to a promotional examination and shall not be promoted.

K.A.R. 1-14-8. Computation of layoff scores. (a) Layoff scores shall be

computed by the appointing authority for each employee in the agency in the class or classes of positions identified for layoff and for employees in classes of positions that may be affected by the exercise of bumping rights.

(b) Layoff scores shall be computed according to the formula: A x L, where:

A = average performance evaluation rating of the employee, as described in 1-14-8(d); and

L = the length of service, as defined in K.A.R. 1-2-46(a), expressed in months.

The layoff scores shall be prepared in accordance with a uniform score sheet prescribed by the director.

STATEMENT OF THE CASE

Petitioner was employed at Kansas State University (hereinafter "KSU") from 1974 until her termination in 1987. She is now employed there pursuant to an order of the Civil Service Board reinstating her. Petitioner's early KSU employment was as a microbiologist. She worked in the area of virology, which is the study of viruses. Her supervisor was Dr. Albert Burroughs. In 1979, Dr. Burroughs gave

Petitioner an outstanding evaluation and asked her to go to bed with him. After she refused, Dr. Burroughs followed up with several instances of physical, sexual harassment including hugging her in the elevator and grabbing and touching of her nipples. Petitioner did not complain because she was afraid of losing her job. After this, there was verbal abuse which included criticism of Petitioner's weight.

In April of 1983, Petitioner read a newspaper article which indicated that writing a letter to the offender might stop sexual harassment. A few days after reading the article, she sent a letter to Dr. Burroughs and that letter reiterated the harassment that she had suffered and asked that he stop. After this, Dr. Burroughs stopped harassing Petitioner for a short period of time.

In August of 1983, Petitioner got sick

and then Dr. Burroughs went on vacation. Dr. Burroughs got back in October. After October, 1983, Dr. Burroughs continued verbal harassment of the Petitioner until July of 1984.

In July, 1984, Dr. Burroughs requested that Petitioner come in on weekends. The Petitioner was afraid to come in on weekends because she would be alone in the laboratory and vulnerable to Dr. Burroughs if he chose to come in. Dr. Burroughs told her he was impotent and that he could get a doctor to swear to it if it would relieve her fears. After she complained about this to Dr. Moore, department chairman, the Petitioner was transferred to a different position in parasitology. She did not request the transfer. Petitioner did not choose to press the subject further.

The work in parasitology was less

complicated than that which Petitioner had done in the past. Petitioner did this work while KSU was getting the position upgraded. After this, they hired someone into the upgraded position. In May of 1985, Petitioner was transferred to mycology, the study of fungi. This was a field with which the Petitioner was not familiar and in which she had no training. Petitioner only received a few weeks training for this position. Petitioner had to teach herself the job. At the end of the two months in the mycology lab, Petitioner was given a choice of remaining in the mycology lab in a permanent position or having another temporary position.

KSU knew at that time that Petitioner had no real experience in the area of mycology. Petitioner expressed concern about the job description for the mycology position which she had been given to

review, but Dr. Wayne Bailie, her mycology supervisor, told her not to worry about it. The Petitioner did not receive any feedback on her performance until May of 1986.

In November of 1985, Dr. Burroughs, Petitioner's previous supervisor, saw her in the hall and called her "fat and ugly". Petitioner complained about this to various university officials and wrote a letter to Dr. Burroughs. The university reprimanded Dr. Burroughs. Petitioner also filed a complaint with the Kansas Commission on Civil Rights on March 6, 1986.

In May of 1986, after she had filed the civil rights complaint, Petitioner received her first negative feedback. She was approached by Dr. Bailie who told her that he was going to hold her to the job description he had previously told her not

to worry about.

Petitioner had no idea what stimulated Dr. Bailie to approach her in this way. She had been absent for a couple of days going to see a psychiatrist because the Kansas Commission on Civil Rights had requested her to do so pursuant to her complaint against Dr. Burroughs and KSU. After this contact with Dr. Bailie, Petitioner contacted the Affirmative Action Office at KSU concerning the job description problem.

Dr. Bailie testified that, by hearsay, he had heard that Petitioner had gone to the Affirmative Action Office and complained about the job description. After this, Dr. Bailie went to Petitioner and stated that he did not like her going to the Affirmative Action Office, over his head. He also gave her a copy of a memo which he sent to Dr. Moore concerning her

job performance. Although Dr. Bailie denied placing a detrimental memo in her file as a result of her going to the Affirmative Action Office, Petitioner indicated in her testimony that he related the two incidents together. This memorandum contains detrimental items about Petitioner and also indicates that she was not proficient in her job performance. Petitioner was given a satisfactory performance evaluation in May, 1986 (which she did not receive until June), but it had unsatisfactory elements. She was supposed to get reevaluated in 90 days.

Petitioner sought to appeal the 1986 evaluation. However, the personnel director of KSU convinced her not to continue with her evaluation appeal and suggested other steps instead. The appeal was dismissed.

As part of the personnel director's

suggestions, Petitioner was to request a meeting with Dr. Bailie and Dr. Moore concerning her situation. Petitioner misunderstood and was expecting that the department would contact her about such a meeting. She had not heard about the meeting by the middle of July, 1986, and wrote a letter to the personnel director informing him of this. Further, since Petitioner's job description required research, she continued to request that she be given research assignments.

Due to the misunderstanding, on July 21, 1986, Petitioner wrote a letter to Dr. Bailie requesting the meeting and requesting that she be given research assignments. She also wrote a letter to the personnel director informing him of the letter to Dr. Bailie. After Petitioner sent the letter to Dr. Bailie on July 21, 1986, requesting a list of research he

wanted her to do, Dr. Bailie did not give her any of the information requested. Instead, he came to the lab and said that Petitioner would be getting another boss in a couple of weeks and that he would let him decide what was to be done. After this, no one expressed any criticism of Petitioner until March of 1987.

Dr. Yousef Al-Doory was Petitioner's new boss. He came in August of 1986. Dr. Al-Doory made major changes in the mycology laboratory. Dr. Al-Doory did not provide much training to Petitioner either. He came into the lab between 1:00 and 2:30 p.m. and sometimes stayed for 10 minutes. At times he would stay until 2:30 p.m. and sometimes later, but this was not very often. He did that from the end of August until the end of October, 1986. In November, Dr. Al-Doory had class and did not spend much time in the

laboratory as a result.

Petitioner went on vacation in December during Christmas break. She only saw Dr. Al-Doory three times between January 12 and March 19, when she received her first unsatisfactory evaluation. Dr. Al-Doory was apparently sick during this period but no official at the university told her that Dr. Al-Doory was sick and provided her alternate supervision.

Despite the lack of criticism of Petitioner during this time, or the lack of any significant training, Dr. Al-Doory wrote a memorandum to Dr. Moore dated January 20, 1987. This memorandum criticized the mycology laboratory. The memorandum specifically addressed Petitioner and her qualifications. The record herein indicates that the then present mycology laboratory was staffed by the Petitioner, who did not have the

qualifications which Dr. Al-Doory desired. These qualifications included a good background in microbiology in general and hands-on bench training in bacteriology. He also thought that such a technician should have previous training in mycology.

Dr. Al-Doory indicated in his memo that this was unfortunate because Petitioner did keep herself busy at all times in the laboratory, tried very hard to understand the details of the daily work, tried her best to cooperate with most of the people and tried to understand and handle new methods and procedures introduced. He indicated that Petitioner overall qualifications, including background, training, knowledge and ability to learn were inadequate.

On March 17, 1987, Petitioner received an unsatisfactory evaluation. She was rated down in identifying fungi,

preparing reports, maintaining stock culture, and preparing media. She received no evaluation in the area of reading journals and received no evaluation in the area of research. No research or journal assignments were made.

This evaluation was appealed to the evaluation appeals committee pursuant to relevant Kansas regulations. At the evaluation hearing, Dr. Al-Doory testified that adequate training for a mycologist would be a clinical degree in microbiology (which Petitioner did not have) and a fast speed.

Dr. Al-Doory testified that Petitioner did not have the background to do the mycology work that he expected.

Dr. Al-Doory was Petitioner's supervisor during most of the evaluation period. During her examination of Dr. Al-Doory, Petitioner's questioning was

interrupted by Mr. Ahlvers, who stated that Dr. Al-Doory was going to have to go. Thereafter, the board broke for lunch and Dr. Al-Doory never returned.

Under the evaluation appeals employed at KSU, attorneys are allowed to attend the hearing, but are not allowed to speak.

The evaluation appeals committee concluded that Petitioner was unsatisfactory and gave her 60 days to improve. The board rated her as unsatisfactory in the area of research -- work which was never assigned to her.

During the 60-day period, Petitioner was assigned additional work in the research area under Dr. Minocha. She was adequate in this area. The remainder of the time she worked under Dr. Al-Doory's supervision. Dr. Al-Doory's evaluation of her for the 60-day period stated as follows:

In response to your request for evaluation of Ms. Lois Morales' work in the Diagnostic Mycology Laboratory during the period of January (my memorandum dated January 20, 1987) through May, 1987. She is still trying her best to correct the deficiencies mentioned in my January memorandum, however:

1. She is still disorganized in her daily work, especially since she started to work both in mycology and virology.

2. There is no significant improvement in her speed in handling daily work.

3. She is still in need of close supervision in regard to certain mycological specimens, mainly fluids and tissues (please refer to my memorandum dated April 27, 1987):

A. In the primary handling and direct examination of such specimens.
B. In the detection and identification of the fungal agents in the direct examination of such specimens.
C. In the follow-up steps in handling and identifying fungal growth from such specimens.

4. She needs to be reminded occasionally by the supervisor to stick to and follow the procedures out- lined in the Laboratory Manual. Even though she is working very hard to satisfy the requirements of her duties in the mycology

> laboratory, I still believe that the deficiencies are due mainly to Ms. Morales lack of basic background in diagnostic microbiology.

Based on this, Petitioner was again rated unsatisfactory by the department chairman and appealed her evaluation. At the appeal hearing, no attorney was present because Petitioner did not feel like the expense was justified, given the fact that an attorney is not allowed to make any presentation whatever under university policy. At the opening of the hearing, Petitioner's spokesperson attempted to read a statement into the record from the attorney and was denied that opportunity. The evaluation, again, was upheld as unsatisfactory. It should be noted that Dr. Al-Doory, the Petitioner's supervisor, was not present at the hearing for examination.

A review of the record in this case

will indicate that the Petitioner could have been better able to pursue her evaluation appeal with the assistance of an attorney in many ways. Evidence could have been presented in a more organized fashion. Cross examination could have been better conducted.

Under Kansas law, evaluations are not only a prerequisite to disciplinary action, but are also used to determine other aspects of an employee's performance.

K.S.A. 75-2943(c) requires the director of personnel for the state to establish a system of evaluations and to adopt rules and regulations for the implementation of such system. It requires that performance ratings be considered in determining the advisability of transfers, the promotion of an employee, as well as increases and decreases in salary. It also prescribes that evaluations should be

considered in "all other decisions relating to the status of employees". K.A.R. 1-7-13 also prescribes the uses for evaluations. It states that evaluations are to be considered for salary step increases, salary decreases, as well as demotion, suspension or dismissal of an employee. It prohibits the promotion of an employee whose last evaluation is a "less than satisfactory" and prescribes a formula utilizing all post-evaluation scores for the purposes of promotional examinations.

At K.A.R. 1-14-8, the procedure for laying-off State employees is set forth. Here, each employee's layoff score is computed according to the formula: A x L where:

A = average performance evaluation ratings of the employee.
L = the length of service.

As can be seen, an evaluation is used

by the State of Kansas in many ways which affect the employee's job future.

Both of Petitioner's unsatisfactory evaluations were timely appealed to the District Court of Riley County pursuant to the Kansas Act for Judicial Review, K.S.A. 77-601 et. seq, on the basis of various infirmities, including lack of representation by an attorney. The District Court of Riley County dismissed the case on the basis that the entire subject should be dealt with in the context of an appeal of the Civil Service Board hearing dealing with Petitioner's termination (see below). The Kansas Court of Appeals upheld this dismissal. (See Appendix C.) Review was denied by the Kansas Supreme Court. (See Appendix D.) The entire matter of Petitioner's evaluation was determined by these courts to be before the Civil Service Board.

After the evaluations, Petitioner was given a termination letter effective July 17, 1987. She thereafter appealed to the Civil Service Board. The Civil Service Board issued the following order:

> This matter comes on for review this 5th day of November, 1987 on the appeal of Lois M. Morales from her dismissal from a Microbiologist I position at Kansas State University.
>
> The matter comes before Chairman Billy S. Sparks and members Glenn Reed, S. Burt DeBaun, Donald P. Cowan and Tim Holt. There are no appearances. The hearing of this matter took place on September 22, 1987 before Chairman Sparks and members Reed, Cowan and Holt and on October 16, 1987 before Chairman Sparks and members Reed and Cowan. At the hearings, the appellant appeared in person and by counsel William E. Metcalf. The respondent University appeared by counsel Dorothy Thompson.
>
> After reviewing the evidence presented at the hearings and the briefs of counsel, the Board finds the action of the appointing authority dismissing the appellant to be unreasonable and modifies the sanction to a demotion to a Medical Technician I position, as further clarified below.

The reason for the Board's action was the testimony of Wayne Bailie and William Moore, Professors of Microbiology and Clinical Pathology, that the appellant received two consecutive unsatisfactory performance evaluations within 180 calendar days of her dismissal, spaced 30 calendar days apart. The Board found the appellant to be inefficient in the performance of her duties in the clinical mycology laboratory.

However, because of the appellant's long term satisfactory employment at the University prior to accepting her present position in the clinical mycology laboratory, the Board felt the appellant should be given the opportunity to accept a vacant Medical Technician I position in the Department of Anatomy and Physiology.

The Board did not find the appellant's unsatisfactory evaluations were the result of retaliation for filing sexual harassment complaints or complaints regarding her job description. Rather the Board found the unsatisfactory evaluations, both of which were appealed, were the result of the appellant inefficiency in the performance of her duties in the clinical mycology laboratory.

It Is Therefore Ordered that the action of the appointing authority dismissing the appellant Lois M. Morales be modified to a demotion in order to allow Ms. Morales 15 days to accept Medical Technician I position

> #060400006 in the Department of Anatomy and Physiology. If the appellant accepts this position, she is to be placed on a 6 month probationary period and must perform satisfactorily during this period. If the appellant refuses to accept the above position, the action of the appointing authority dismissing the appellant is affirmed. . . .

The Petitioner accepted the proffered position.

After this, a petition for rehearing before the Kansas Civil Service Board was filed pursuant to relevant Kansas statutes.

This was denied, and the case was then appealed to the District Court of Shawnee County. The issue concerning the restrictions on participation of attorneys in evaluation appeal hearings was raised before the District Court of Shawnee County. (See District Court Petition in Record.) It was also raised in the Court of Appeals and Supreme Court. (See

Appendix A and B.)

The second point of concern occurred after the Civil Service Board order was entered. Since the Civil Service Board order indicated that Petitioner's termination was unreasonable and she was given a limited period of time to take another position, Petitioner understood the order to mean that she would receive back pay to July 17, 1987, at her demoted rate.

Because KSU refused to pay Petitioner her back wages for the period July to January (there were certain exceptions for periods of time that would not be compensated agreed to by the parties), Petitioner filed a motion to amend the petition for review on March 21, 1988. (See Motion in the Record.) The object of this motion was to compel KSU to pay Petitioner her back wages for the relevant time. The District Court of Shawnee County upheld the actions

of the Civil Service Board. The District Court did not grant the Petitioner's request for back pay. Then, the Petitioner filed a motion to alter or amend judgment. Such motion was denied and an appeal to the Kansas Court of Appeals followed.

The Kansas Court of Appeals affirmed the District Court of Shawnee County, Kansas. The issues concerning the limitations on attorneys in the evaluation appeals process and the denial of back pay were specifically raised and addressed by the Kansas Court of Appeals. (See Appendix A.) Review was granted by the Kansas Supreme Court which reviewed the case and affirmed the Kansas Court of Appeals. This petition follows.

REASONS FOR ALLOWING THE WRIT

A. <u>On the issue of whether the evaluation procedures applied to</u>

Petitioner at KSU were improper, the decision of the Kansas Supreme Court departs from established constitutional principles and it is necessary for the United States Supreme Court to review this important issue.

KSU did not permit the Petitioner's attorney to speak at the evaluation appeal hearing.

It is generally held that one of the essential elements of a due process administrative hearing is the right to employ counsel and be represented by counsel. Goldberg v. Kelly, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970); Bowles v. Baer, 142 F.2d 787 (7the Cir., 1944); Brown v. Air Pollution Control Board, 37 Ill.2d 450, 227 NE.2d 754, 33 ALR.3d 222 (Ill, 1967); Goldwyn v. Allen, 54 Misc.2d 94, 281 NYS.2d 899 (NY, 1967).

In Goldberg, the oft-cited statement

in Powell v. Alabama, 287 U.S. 45 (1932), that "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel" is quoted to support the proposition that representation by counsel is required in administrative proceedings mandated by the Constitution. This is a definitive statement of the general rule that, where a constitutional right is at stake, the right to employ counsel will generally be accorded the parties.

Here, it is clear beyond doubt that two unsatisfactory evaluations will have a continuing and detrimental effect on the Petitioner's future employment opportunities within the state system. This is particularly true because many of the effects of an evaluation will continue in light of Petitioner's reinstatement. It is now clear that when the state takes

action against an individual where future employment opportunities are threatened, the individual's liberty interest is threatened as well. Walker v. United States, 744 F.2d 67 (10the Cir. 1984); Miller v. City of Mission, Kansas, 705 F.2d 368 (10the Cir. 1983); Wurtz v. Southern Cloud School District, 218 Kan. 25, 542 P.2d 339 (Kan. 1975). The Kansas Court of Appeals and the Kansas Supreme Court found that the Petitioner had a liberty interest at stake at her evaluation appeal hearings.

Under K.A.R. 1-7-12, the result of the evaluation appeal procedure is final and not subject to further administrative appeal. Under the Kansas Judicial Review Procedures, K.S.A. 77-601 et. seq., review is limited to the record. Thus, the procedure utilized must be fair and allow the employee to make a record which may persuade the decision-maker to decide in

his/her favor and which is suitable for judicial review. Proper procedure is required in such situations in order to assure that petitioner's rights are adequately protected. This includes the right to full representation by an attorney.

K.A.R. 1-7-12 provides for an evaluation "appeal". It provides for a fair and impartial decision-maker. Id. at (a)(4). It requires that the decision-maker consider relevant evidence and provides for the examination and cross-examination of witnesses. Id. at (b)(2). In other words, the regulations require a trial-type hearing. In this case, the right to representation by counsel should be constitutionally implied.

Under the procedures employed by KSU, counsel's role is limited. All that is permitted is for counsel to sit next to

his client at the hearing and whisper advice. This makes for an unfair, bulky and difficult procedure. At the evaluation appeal hearing of April 10, 1987, held respecting Petitioner's first evaluation, this procedure of whispering was employed. The transcript is replete with "pause" notations where Petitioner's counsel was trying to communicate advise.

The KSU procedure does provide for an employee to appoint a spokesman for evaluation appeals. At the second appeal hearing, Petitioner was denied the right to place a statement from her attorney into the record through her appointed spokesperson.

In sum, the entire procedure developed by KSU is designed to frustrate the participation of an attorney in the appeal process. This procedure violates due process.

The Kansas courts held that the Constitution did not require that an evaluation appeal procedure allow the active participation by an attorney. Quoting Cleveland Board of Education v. Loudermill, 470 U.S. 532, 84 L.Ed.2d 494, 105 S.Ct. 1487 (1985), the court essentially holds that since there is a full-fledged evidentiary hearing provided before the Civil Service Board, such hearing is not required at the evaluation appeals committee level. However, these decisions are off the mark. The evaluation appeals process is a separate and distinct administrative process and the regulations themselves provide the decision of an evaluation appeals committee is not subject to any further administrative review. In this case, it is impossible for the Civil Service Board to review or change the evaluation. Thus,

even though an evaluation may be utilized as a basis to take some disciplinary action against an employee, the evaluation itself stands as a separate administrative action subject to separate review. As pointed out above, there are several adverse actions which come about as a result of a poor evaluation over which the Civil Service Board has no jurisdiction whatever. Therefore, a state employee may be subjected to adverse employment actions based on unsatisfactory evaluations even where such employee prevails in front of the Civil Service Board.

Thus, protection of the liberty interest requires that an employee be allowed to have full participation of an attorney at an evaluation hearing. This is particularly true because the evaluation results are entitled to res judicata effect in civil service board proceedings.

Neunzig v. Seaman U.S.D. 345, 239 Kan. 654 (1985).

Further, at K.A.R. 1-7-12 states that the employee and the rater "shall have an opportunity to question any person offering evidence to the appeal committee". Here, Petitioner was denied the right to question all adverse witnesses. Dr. Al-Doory only appeared at the first hearing. Dr. Bailie never appeared. Her questioning of Dr. Al-Doory during the first evaluation appeal was permeated by constant pressuring because Dr. Al-Doory had to go. In sum, Petitioner was denied the right to adequately cross-examine adverse witnesses. This right could have been protected by active participation by an attorney. This violates due process.

In Petitioner's view, the right to effective assistance of counsel is constitutionally mandated by the

precedents of this Court. The Kansas Supreme Court has denied the Petitioner the right to effective assistance of counsel in evaluation appeal hearings. The evalutions affect future disciplinary action, pay increases, layoffs, and promotions. This case presents an important issue of federal law which should be decided by this Court.

B. The Kansas courts wrongfully held that the Petitioner was not entitled to back pay and this Court should correct this error.

Under the civil service laws of Kansas, individuals are entitled to a brief pre-termination meeting with their supervisor prior to termination and a full-blown evidentiary hearing before the Civil Service Board after termination. Clearly, if the Civil Service Board finds that the action of the appointing authority is

unreasonable, the order must be retroactive. Indeed, where the only full-blown evidentiary hearing provided to an employee is provided after termination, the decision or order of the Civil Service Board must relate back to the date of termination. Any other result would appear to be unconstitutional. Loudermill, supra.

The Civil Service Board has the right to modify the discipline imposed by an appointing authority. K.S.A. 75-2929(e). The Kansas State statutes are clear about the type of discipline which may be imposed. An employee may either be dismissed, demoted, or suspended. K.S.A. 75-2949(a). Suspensions without pay are limited to 30 days. Id.

Here, KSU dismissed the Petitioner because she had two unsatisfactory performance evaluations. The Civil

Service Board found that this action was unreasonable. The Civil Service Board ordered that, since the Petitioner had many years of satisfactory performance with KSU, she should have been demoted to another open position instead of being dismissed. The board requested KSU to submit a list of positions which it felt Petitioner could fill. KSU submitted only one position to the board which they indicated Petitioner had interviewed for and did not want. The board gave Petitioner 15 days after the order was entered to take this position or the dismissal would stand. Petitioner accepted the position.

If the Civil Service Board had decided that Petitioner would not be reinstated to full employment rights in the demoted position retroactive to her termination date, it would have had to take some action against Petitioner consistent with the

civil service statutes. Under the law, this action would have been a suspension. However, it would appear that a suspension could have only been for a period of 30 days. See K.S.A. 75-2949(a).

The Civil Service Board did not take any action to suspend Petitioner, but, instead, ordered her demoted and reinstated to a position at KSU. This clearly implies that the effective date of her demotion would be July 17, 1987.

It is basic that Petitioner had a property right in her job. She could not be deprived of this property without due process of law. Loudermill, supra. In this instance, due process was given, and the Civil Service Board found that Petitioner should not be completely deprived of her property interest. Her continued employment at KSU was ordered by the board. Thus, unless the board took

affirmative action to suspend Petitioner, her reinstatement was retroactive and she is entitled to her property, including salary and benefits.

The order of the Civil Service Board must be interpreted to imply that Petitioner is entitled to back pay and benefits in order for it to be consistent with the Constitution.

The effect of KSU's action has been to suspend Petitioner for a period of several months without pay or benefits.

The Kansas Court of Appeals held that the Petitioner was not entitled to back pay on the basis that the Civil Service Board did not address the issue in its order and because it was never raised. However, the issue before the Civil Service Board was not whether the Petitioner would receive back pay. It was whether she should be reinstated. Petitioner asserts that since

she was reinstated, the Constitution mandates back pay.

The issue whether Petitioner is entitled to back pay in this circumstance is an important federal question which this Court should address.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the writ of certiorari be allowed.

Respectfully submitted,

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APPENDIX A

NOT DESIGNATED FOR PUBLICATION

IN THE SUPREME COURT
OF THE STATE OF KANSAS

No. 63,242

LOIS MORALES,
Appellant,

v.

KANSAS BOARD OF REGENTS and
KANSAS STATE UNIVERSITY,
Appellees.

MEMORANDUM OPINION

Review of the judgment of the Court of Appeals in an unpublished decision filed September 8, 1989. Appeal from Shawnee district court; THOMAS W. REGAN, judge. Judgment of the Court of Appeals affirming the district court is affirmed. Judgment of the district court is affirmed. Opinio filed April 13, 1990.

William E. Metcalf, of Metcalf & Justus, of Topeka, argued the cause and

was on the briefs for appellant.

Dorothy L. Thompson, associate university attorney, Kansas State University of Manhattan, argued the cause and was on the briefs for appellees.

PER CURIAM: We have reviewed and considered the briefs, the arguments, and the record in this case. We conclude the unanimous opinion of the panel of the Court of Appeals was correct. We, therefore, adopt the unpublished opinion of the Court of Appeals, Morales v. Kansas Board of Regents, No. 63,242 filed September 8, 1989, affirming the trial court.

APPENDIX B

NOT DESIGNATED FOR PUBLICATION

No. 63,242

IN THE COURT OF APPEALS OF THE
STATE OF KANSAS

LOIS MORALES,
Appellant,

v.

KANSAS BOARD OF REGENTS and
KANSAS STATE UNIVERSITY,
Appellees.

MEMORANDUM OPINION

Appeal from the Shawnee District Court; THOMAS W. REGAN, judge. Opinion filed September 1, 1989. Affirmed.

William E. Metcalf, of Metcalf and Justus, of Topeka, for the appellant.

Dorothy L. Thompson, associate university attorney, Kansas State University, of Manhattan, for the appellees.

Before GERNON, P.J., LEWIS, J., and DAVID F. BREWSTER, District Judge,

assigned.

LEWIS, J.: Lois Morales appeals from the district court's order upholding the decision of the Civil Service Board (CSB) in a case involving the alleged unreasonable termination of her employment.

After reviewing the record, we find no error and affirm the decision of the district court.

The record in this case is quite extensive and indicates that a very thorough and careful factual examination was made by both the CSB and the district court in reaching the decisions involved. Because the facts are so voluminous, we will refer to them only as necessary to a complete understanding of this opinion.

We deem it necessary for an understanding of this opinion to give at least a chronology of the employment of Morales at KSU and the problems she encountered.

Morales graduated from KSU with a degree in biology in 1968 and entered into her employment at KSU as a microbiologist in the veterinary department. Her years of employment at KSU have been fraught with controversy and have apparently been somewhat unpleasant. She insists her current problems began when her supervising professor began making sexual advances to her. She spurned these advances, wrote letters to the professor, and made her complaints known to the appropriate authorities. She ultimately filed a sexual harassment case against KSU and the professor. This lawsuit was dismissed as being barred by the statute of limitations and that decision was appealed to this court and affirmed. She contends in this appeal that her efforts to protect herself against sexual harassment resulted in her job termination at KSU.

Because of her problems with the professor, and perhaps for other considerations, Morales was transferred to a different department in 1984, and in 1985 she was tranferred to the mycology lab under the supervision of Dr. Bailie. Morales had no prior experience in mycology or in the procedure utilized in the lab and apparently had a great deal of difficulty doing the work required.

In August 1986, Dr. Al-Doory took over supervision of Morales and the mycology lab. Dr. Al-Doory was apparently a person of some renown in his field and instituted a number of changes in the lab, which he expected Morales to follow.

The evidence indicates that at KSU, as in other facilities of higher and intermediate education, regular evaluations are conducted to determine the satisfactory or unsatisfactory performance of employees.

Prior to 1986, Morales had been evaluated on a number of occasions and had always received satisfactory evaluations. In March 1986, she received an unsatisfactory evaluation from Dr. Al-Doory, who indicated that, while he thought she was doing the best she could, her best was simply not good enough and she was not qualified to do the work.

At KSU, a due process procedure has evolved in which an unsatisfactory evaluation can be appealed to a committee. Morales appealed her evaluation to the committee which, after hearing the evidence, issued its own unsatisfactory evaluation and suggested Morales be reevaluated in 60 days. After the passage of 60 days, Morales was again evaluated and again her performance was deemed unsatisfactory. She appealed that

again issued its second unsatisfactory evaluation.

After the two unsatisfactory evaluations had been affirmed by the committee, the department head requested that Morales be dismissed. She was dismissed from her job at KSU effective July 17, 1987.

After being dismissed from her job, Morales filed an appeal with the CSB which conducted a very thorough investigation into the facts preceding the letter of dismissal. The order of the CSB resolving the crisis is somewhat disingenuous in that, while the CSB agreed that Morales was inefficient in her present job, it held her dismissal was unreasonable because of her long and satisfactory years of service at the university, and ultimately concluded that she should be demoted to a medical technician position. The CSB also

concluded that her unsatisfactory evaluations were not, as she contended, in retaliation for the filing of sexual harassment complaints, but were the result of her inefficiency as an employee in the mycology lab at KSU. The CSB ordered another job be offered to her at KSU, but did not award her back pay, and there is no indication in the record that it was asked to award her back pay.

Morales then filed a petition for review before the district court. Sometime after this petition for review was filed, she asked to amend it to add a count that asked that her back pay be restored. The district court upheld the decision of the CSB and refused to consider the issue of back pay since the matter had not been raised at the administrative level. This appeal followed.

Morales first insists that the evidence clearly shows her termination by KSU was for retaliation for her complaints about sexual harassment and that the CSB's finding to the contrary was not supported by substantial evidence.

K.S.A. 1988 Supp. 75-2949 provides that the agency's appointing authority may dismiss or demote a classified permanent employee for the good of the service, but that no employee may be dismissed or demoted for political, religious, racial, or other non-merit reasons. Subsection (g) of that statute provides that no employee shall be disciplined or discriminated against because of his or her proper use of appeal procedure. Subsection (f) provides that any employee who is dismissed, demoted or suspended may request a hearing with the state civil service board to determine whether the action of the agency was

reasonable. K.S.A. 1988 Supp. 79-2949e provides that the grounds for dismissal, demotion, or suspension include inefficiency, incompetency, inability, or negligence in the performance of an employee's duties.

K.S.A. 77-601 et seq. provides for a judicial review of all agency actions and K.S.A. 1988 Supp. 77-606 provides that the provisions of the act are the exclusive means of obtaining judicial review of agency actions. The scope of judicial review is contained in K.S.A. 77-621, which provides in pertinent part:

> "(a) Except to the extent that this act or another statute provides otherwise:
>
> "(1) the burden of proving the invalidity of agency action is on the party asserting invalidity; and
>
> "(2) the validity of agency action shall be determined in accordance with the standards of judicial review provided in this section, as applied to the agency action at the time it

was taken.

. . . .

"(c) The court shall grant relief only if it determines any one or more of the following:

. . . .

"(7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this act; or

"(8) the agency action is otherwise unreasonable, arbitrary or capricious."

In reviewing an agency order, the district court must presume that the agency's findings are valid and the court may not set aside an agency order because it may have reached a different conclusion had it been the trier of fact. Zinke & Trumbo, Ltd. v. Kansas Corporation Comm'n, 242 Kan. 470, 474, 749 P.2d 21 (1988). The district court may set aside the

agency's finding if it "'is so wide of the mark as to be outside the realm of fair debate,'" or, in other words, not supported by substantial competent evidence. 242 Kan. at 474. In addition, the court may set aside an agency's action if it is arbitrary and capricious. An agency's action is arbitrary and capricious if it is unreasonable or without foundation in fact. An unreasonable action is one take without regard to the benefit or harm to all interested parties. 242 Kan. at 475. In reviewing an agency's order, the district court should take into consideration the harmless error rule. K.S.A. 77-621(d).

Upon review of a district court's decision, this court will first determine whether the district court observed the requirements and restrictions placed upon it and then make the same review of the

administrative tribunal's action as did the district court. Swezey v. State Department of Social & Rehabilitation Services, 1 Kan.App.2d 94, 562 P.2d 117 (1977) (quoting Kansas State Board of Healing Arts v. Foote, 200 Kan. 447, 436 P.2d 828 [1968]).

In essence, the question before this court, if all procedural requirements have been met, is whether the agency's action was arbitrary or capricious and whether it was supported by substantial competent evidence. Swezey, 1 Kan.App.2d at 98.

We have reviewed the record and are convinced that all procedural requirements have been met. We are therefore left with a determination of whether the agency's action was, if any sense, arbitrary or capricious, and ultimately whether it was supported by substantial competent evidence.

We do not intend to analyze the

somewhat unpleasant evidence concerning Morales' sexual harassment claims. We have, however, carefully reviewed the entire record and have considered the sexual harassment claims, the context of when those claims were made, and when the action to terminate her employment was taken.

We note that Morales largely received satisfactory evaluations before she was transferred to the mycology department. She was not experienced in that area, but her supervisors believed she would be able to do the job. However, the record shows that, after two years, she was still not performing the duties as required and received the two consecutive unsatisfactory evaluations. The CSB and the district court both determined that the unsatisfactory evaluations were not arbitrary or capricious nor retalitory in

nature, but that the action of dismissal was inappropriate since it was her lack of qualification, and not anything intentional on Morales' part, that caused her problems. The CSB's rulings in this regard are supported by substantial competent evidence and will not be overturned by this court.

Morales next argues that KSU acted arbitrarily and capriciously when it transferred her to the mycology department, knowing she had no experience in this area. However, the record shows that she chose this position over another which was available and that her supervisors made considerable efforts to train her in the operation of that laboratory. The record supports a conclusion that, while Morales received much training from her superiors, she still was not competent to handle the position. The fact that she was not able to perform those duties satisfactorily,

despite that training, does not result in a conclusion that the action transferring her to mycology was arbitrary and capricious. The decision by the CSB and district court that it was not arbitrary and capricious is supported by substantial competent evidence.

Morales next argues that, even assuming it was proper to demote her, equity required that she should have been demoted to a different position.

Without detailing the facts underlying this argument, this court finds no merit in the stand taken by Morales. She was, insofar as we can glean from our review of the record, offered her choice of available positions in which she was qualified to work. Subsequently, one of those positions was inadvertently filled and not available, but we see nothing suspicious in that fact and there is no

evidence to indicate it carries any sinister connotation or that it was done to thwart the order of the CSB. Morales subsequently accepted the medical technician position similar to the one which had been inadvertently filled. Upon our review of the record, we simply see no grounds for complaints by Morales on the procedure followed in restoring her to a job at KSU.

In this regard, Morales argued there were veterinary technician jobs available at the time KSU was asked to submit positions for her. The evidence is conflicting as to whether Morales had actually performed the duties of a veterinary technician at KSU. It is, however, uncontroverted that, to become a veterinary technician, one must be certified as having completed a two-year veterinary technincian program. Morales did not have this certification and was not qualified to fill

that position. As a result, it was not reasonable for KSU to demote her to a position other than that of veterinary technician, and not arbitrary or capricious for the CSB to affirm the demotion to that position.

Morales' next issue concerns the due process procedures employed by KSU for the appeal of employee evaluations. Specifically, Morales challenges the limitations on the use of an attorney during the appeal process, and complains about her limited ability to cross-examination Dr. Al-Doory. She argues that these limited procedures violated her due process rights.

Certainly, we agree that Morales had a liberty interest at stake in the evaluation process because her future employment opportunities are threatened by an unsatisfactory evaluation. The freedom

to take advantage of other employment opportunities has been recognized by our federal courts. See Walker v. United States, 744 F.2d 67, 69 (10th Cir. 1984).

Having concluded that a constitutionally protected interest was at stake, the next issue is what due process is and what is required to protect that interest. State ex rel. Stephan v. Smith, 242 Kan. 336, 747 P.2d 816 (1987).

In In re Petition of City of Overland Park for Annexation of Land, 241 Kan. 365, 370, 736 P.2d 923 (1987), the Kansas Supreme Court summarized due process requirements in administrative proceedings as follows:

> "[T]he full rights of due process present in a court of law do not automatically attach to a quasi-judicial hearing. See Goss v. Lopez, 419 U.S. 565, 42 L.Ed.2d 725, 95 S.Ct. 729 (1975). The concept of due process is flexible in that 'not all situations calling for

> procedural safeguards call for the same kind of procedure.' Morrissey v. Brewer, 408 U.S. 471, 481, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972). The basic elements of procedural due process of law are notice and an opportunity to be heard at a meaningful time and in a meaningful manner. U.S.D. No. 461 v. Dice, 228 Kan. 40, Syl. 1, 612 P.2d 1203 (1980)."

There is no question but that the process employed in appealing Morales' unsatisfactory evaluations provided her with adequate notice and an adequate opportunity to be heard at a meaningful time and in a meaningful manner. Morales complains that the process falls short of protecting her due process rights when it limits the role of her attorney to that of an advisor. That is to say, during hearings on appeals from an unsatisfactory evaluation at KSU, the employees are entitled to have an attorney present. That attorney, however, is not allowed to speak or ask questions but only to confer

with his client. During Morales' hearings, she was accompanied by counsel and there were numerous pauses when she conferred with him.

We do not believe that at this stage of the proceedings due process requires that Morales had the right to full participation by an attorney. There must be some point in the process at which an attorney is fully permitted to participate and some point at which an attorney may be constitutionally limited in his participation. The United States Supreme Court has stated that, prior to dismissal, the employee's only due process rights are oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542, 84 L.Ed.2d 494, 105 S.Ct. 1487 (1985).

In the present case, Morales was provided notice of the charges against her, access to the evidence against her, and an opportunity to tell her side of the story. We hold that she was not denied her due process rights by the KSU rule which limited the role of her attorney in that particular hearing to that of an advisor. In other words, we do not believe that, at this stage of the proceedings, an employee's constitutional rights are so egregiously threatened that due process requires full participation by counsel.

Morales next complains that her right to cross-examine Dr. Al-Doory was limited by the appeal committee. The right to cross-examine witnesses during a quasi-judicial administrative hearing is generally recognized as an important requirement of due process. Adams v. Marshall, 212 Kan. 595, 599-600, 512 P.2d

365 (1973). In addition, K.A.R. 1-7-12 gives the employee the right to question any person who offers evidence to the appeal committee.

We have examined the record of the transcript concerning the cross examination of Dr. Al-Doory by Morales and conclude that she was given an adequate opportunity to cross-examine Dr. Al-Doory and that the procedure employed by KSU in this regard did not violate any of Morales' due process rights.

The last argument advanced by Morales is perhaps the most difficult to resolve. As pointed out earlier, the CSB concluded that, although Morales was inefficient, KSU acted unreasonably in dismissing her and ordered KSU to reinstate her, or at least to offer her suitable employment. The CSB did not, however, order back pay and, as near as we can tell, that issue was not

even raised by the parties until after Morales filed her petition for review in the district court. We see no discussion in the record before the CSB concerning back pay, no request by Morales for back pay, and no mention of the back pay in her petition for rehearing before the CSB. Yet, at the same time, it appears a bit incongruous to deal with a decision wherein it is held that an employee's job was unreasonably terminated but which, at the same time, does not address or restore her back pay.

The district court held that Morales failed to exhaust her administrative remedies with regard to the issue of back pay and refused to consider that issue.

K.S.A. 77-612 states that, before judicial review is available, the petitioner must exhaust all available administrative remedies. The district

court does not have jurisdiction to consider or rule upon any new issues. In addition, K.S.A. 75-2929e(c) provides that, within ten days of the civil service order, the party aggrieved may apply for a rehearing in respect to any matter determined therein. On the other hand, this statute quite clearly states that, if the rehearing is not granted within ten days after the motion is filed, it is deemed denied and is final and binding upon all parties. If the petition for rehearing is granted, the CSB is directed to conduct a rehearing de novo. By the same token, if no motion for rehearing is filed, the party cannot appeal the decision of the CSB to the district court. In the motion for rehearing, the statute requires the petitioner to specifically state the grounds supporting his or her claim that the order is unlawful or unreasonable and a subsequent appeal to the

district court will be limited to those grounds set forth in that motion.

Morales filed a petition for rehearing before the CSB, in which she did not mention the issue of back pay. There is nothing to indicate that the issue of back pay was raised before she asked the district court to permit her to amend her petition for review. The right to appeal from an administrative agency action to the district court is not a constitutional right nor is it a guaranteed right, but a right conferred by statute only. Olathe Community Hospital v. Kansas Corporation Comm'n, 232 Kan. 161, 166, 652 P.2d 726 (1982). The statutes governing appeal of matters from an administrative agency to the district court cleary require that issues appealed to the district court must have been raised before the administrative body.

We have reviewed the CSB proceedings in which Morales was involved and cannot find that Morales ever raised the issue of back pay. We hold that, since Morales did not raise this issue below, she did not exhaust her administrative remedies and the district court was correct in stating that it did not have jurisdiction to award her back pay. The district court was likewise correct in denying her motion to amend her appeal to include the issue of back pay.

Morales argues that back pay should be "implied" by the CSB's order, which held that KSU's efforts to terminate Morales were unreasonable and which ordered KSU to offer her another job. We are not persuaded by appellant's argument in this regard. We note that, under K.S.A. 75-2929e(a), the CSB has rather broad discretion and ability to fashion whatever remedy it deems suitable and advisable

under the circumstances. We believe that, under the correct circumstances, the CSB has the authority to determine that the proper remedy is to restore an employee to a job within the agency or institution but to withhold back pay. This disposition recognizes merit in the positions of both parties. We point out that the CSB found and determined that Morales was inefficient in her job function at KSU. Its order, while recognizing her inefficiency, also recognized that, due to her many years of service at KSU, it was unreasonable to terminate her and she should be demoted and given a job which she could handle with efficiency. The failure to award back pay could be nothing more than a recognition by the board that there was some merit in KSU's taking the action it did.

However, this is only speculation.

The issue of the back pay was not raised by Morales before the CSB and there is no way for us to determine why the board did not find that Morales should recover back pay. It was the obligation of Morales to raise all issues which she deemed necessary to present her case to the CSB. It is obvious that the issue of back pay was a necessary issue. It was not raised, her administrative remedies were not exhausted with regard to this issue, and the district court simply had no jurisidction to consider the issue of back pay.

Affirmed.

APPENDIX C

NOT DESIGNATED FOR PUBLICATION

No. 62,098

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

LOIS MORALES,
Appellant,

v.

KANSAS STATE UNIVERSITY, et al.,
Appellees.

MEMORANDUM OPINION

Appeal from Riley District Court; JERRY L. MERSHON, judge. Opinion filed November 4, 1988. Affirmed.

William E. Metcalf, of Metcalf and Justus, of Topeka, for appellant.

Dorothy L. Thompson, associate university attorney, Kansas State University, of Manhattan, for appellee.

Before REES, P.J., RULON AND GERNON, JJ.

Per Curiam: Lois Morales appeals the

district court's dismissal of her petition for judicial review of her job performance evaluations. Finding no error, we affirm.

Morales worked as a microbiologist I at Kansas State University. An employee performance evaluation was conducted in March 1987 for a rating period of May 1986 to March 1987. Her overall performance rating was unsatisfactory and reevaluation in 60 days was recommended. The performance evaluation was reviewed by the appeals committee which upheld the unsatisfactory evaluation.

Morales was reevaluated on June 1, 1987, and again received an unsatisfactory rating. This evaluation was reviewed by the appeals committed and the unsatisfactory rating was upheld.

Morales filed petitions for judicial review in the district court of Riley County. Kansas State University et al.

(KSU) filed motions for summary judgment. Morales filed responses to the motions for summary judgment and the cases were consolidated. In October 1987, the district court denied KSU's motions for summary judgment and ruled that it had jurisdiction to review the job performance evaluations pursuant to the Kansas Judical Review Act, K.S.A. 77-601 et seq.

In November 1987, KSU filed a motion to dismiss Morales' petitions for review contending that the performance evaluation issue had been decided by an order of the Kansas Civil Service Board on November 17, 1987, in a separate but related case. Following Morales' second unsatisfactory evaluation, she was dismissed, and she appealed that dismissal to the State Civil Service Board. The Civil Service Board found the dismissal unreasonable and modified the sanction to a demotion to

medical technician I. Morales appealed that order to the district court of Shawnee County.

In granting the motion to dismiss, the district court of Riley County stated that "the issues are basically the same and that court's going to have jurisdiction to look at the totality of the whole matter. . . ." The court further stated that "the petitioner is speculating as to the future adverse consequences of her previous unsatisfactory evaluations and the District Court who reviews the ultimate decision of the Civil Service Board will have an opportunity to review the evaluations of the petitioner as would this Court if this matter went to decision."

Morales contends on appeal that the District Court of Riley County is obligated to conduct judicial review of her performance evaluations and that the Civil Service

Board can only determine if her dismissal was reasonable.

This case turns on the Riley County district court's conclusion that Morales' petitions for review of the job performance evaluations be dismissed "on the ground that the Kansas Civil Service Board has set forth an order on the issues related to said performance evaluations and that all such issues are subject to review in an appeal of that Board's order."

In ruling on the motion to dismiss, the district court stated a conclusion of law; appellate review of conclusions of law is unlimited. Utility Trailers of Wichita, Inc. v. Citizens Nat'l Bank & Tr. Co., 11 Kan.App.2d 421, 423, 726 P.2d 282 (1986).

We agree with the district court's conclusion that, upon appeal of the Civil

Service Board's order, Morales placed all issued relating to the performance evaluations before the Shawnee District Court.

Affirmed.

APPENDIX D

IN THE SUPREME COURT OF THE
STATE OF KANSAS

Lois Morales, Appellant	)	
	)	
v.	)	No. 88-62098-A
	)	
Kansas State University, Appellees.	)	
	)	

You are hereby notified of the following action taken in the above entitled case:

Petition for review.

Denied.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date January 31, 1989